

**SUMMARY OF PUBLIC COMMENTS AND DEQ RESPONSES**  
**INTENT TO APPROVE THE VIRGINIA AQUATIC RESOURCES TRUST FUND**  
**2004 ANNUAL REPORT**

DEQ published in the October 31, 2005 *Virginia Register of Regulations* a notice of intent to continue use of the Virginia Aquatic Resources Trust Fund (the Fund) as one of several acceptable methods of providing compensatory mitigation for permitted impacts to surface waters. In the notice, DEQ proposed the following conditions:

- 1. DEQ has the opportunity to review and comment on wetland and stream project plans;**
- 2. The Fund cannot be used as a compensatory mitigation option in geographic areas having approved mitigation banks with appropriate credits available for purchase;**
- 3. Monitoring reports on wetland and stream restoration sites are completed and available for review;**
- 4. DEQ has input on the development of criteria to establish fee amounts for stream restoration.**

A total of 13 written responses (including email and facsimile correspondence) were received by the comment period deadline from state and federal government agencies, businesses, and environmental advocacy organizations. These responses contained multiple comments addressing a variety of concerns and providing recommendations. All of the written comments will be kept in the public record. The following agencies and organizations responded to this public notice:

U.S. Army Corps of Engineers (USACE) - Bob Hume  
Wetland Studies and Solutions, Inc. (WSSI) - Michael Rolband  
Virginia Department of Game and Inland Fisheries (DGIF) – Andrew Zadnik  
The Nature Conservancy (TNC) – Nicole Rovner  
National Park Service – Blue Ridge Parkway (NPS-BRP) - Shelia Gasperson  
Western Virginia Land Trust (WVLT) – Roger Holnback  
Southern Environmental Law Center (SELC) – Morgan Butler  
Virginia Institute of Marine Science (VIMS) – Carl Hershner  
Earth Source Solutions (ESS) – Brent Fults  
Canaan Valley Institute (CVI) – Stephen Talley  
Virginia Department of Conservation and Recreation (DCR-DNH) – Thomas Smith  
U.S. Fish and Wildlife Service (FWS) – Karen Mayne  
Chesapeake Bay Foundation (CBF) – Mike Gerel

The public comments presented below have been grouped, where possible, into similar categories for brevity and clarity.

**DEQ has the opportunity to review and comment on wetland and stream project plans**

1. USACE: USACE comments that DEQ should limit comment period to 14 days.
2. DGIF: DGIF comments that continued coordination with DGIF during mitigation projects is necessary to address wildlife conservation and to recommend mitigation beyond mitigation banks or the Fund for projects involving critical wildlife resources.
3. TNC: TNC considers this condition a formalization of existing processes allowing for “DEQ input on project plans”. TNC points out that the MOA between the TNC and USACE states that USACE “regularly consults with DEQ on selection of sites”.
4. VIMS: Further specifies that any wetland permitting utilizing the Fund be handled through one central DEQ office (Central Office) in order to coordinate accurate tracking of the Fund’s performance regarding replacement of acreage and functions.
5. ESS: However, ESS generally questions the current review process for Fund projects based on perceived disparity between monitoring and success criteria for approving Fund projects versus mitigation banks.
6. FWS: FWS recommends that proposed Fund projects be reviewed by a Review Team consisting of State and Federal components, similar to the process used by mitigation banks review teams (MBRTs).
7. CBF: “As the lead agency in the VWP Program, DEQ should ensure strict adherence statewide to the sequencing provision called out at 9VAC25-115B”. CBF recommends the DEQ’s role in the implementation of the Fund be formalized to ensure the Fund’s compliance with the VWPP.

**DEQ Response:** It appears that there is no opposition to this proposed condition and that it formalizes an existing informal process.

**The Fund cannot be used as a compensatory mitigation option in geographic areas having approved mitigation banks with appropriate credits available for purchase:**

1. USACE: USACE does not object to the apparent intent to address no-net-loss by giving preference to mitigation projects that are accomplished over those that are not yet accomplished. However, as written, the condition expresses a preference for a particular type of entity instead of a type of mitigation. They cite the fact that mitigation banks can sell up to 15% credits in advance of completed mitigation. They state that the Fund can, in some situations, provide the same benefit as mitigation banks in terms of mitigation already completed. They believe the proposed condition, as written, is not sufficiently connected to the goal of no-net-loss, and in some instances might actually conflict with the goal. They

state that the proposed condition seems inconsistent with 9VAC25-210-115.B.3, which provides for a general sequence of preference, but specifies that mitigation options “shall be evaluated on a case-by-case basis” in terms of replacement of wetland or stream acreage and function. They suggest the following modification to the proposed condition:

*The Fund cannot be used as a compensatory mitigation option in geographic areas having approved mitigation banks with appropriate credits available for purchase unless the Fund has mitigation projects completed, acquired, or pending in that area that adequately address existing impacts on a no-net-loss basis.*

2. WSSI: WSSI wants to add a stipulation that Fund expenditures be within the same HUC or adjacent HUC within the same watershed as that of the impacts. WSSI cites §61.2-44.15:5.E of the *Code of Virginia* to support. WSSI states, “Applying such a condition to Fund compensation would have a positive effect on water quality and ecological integrity within each watershed”.
3. TNC: TNC cites 9 VAC 25-210-115.B.3, which lists the preferred sequence of mitigation options, then specifies, “*However, the appropriate compensatory mitigation option for project impacts shall be evaluated on a case-by-case basis, in terms of replacement of wetland or stream acreage and function*”. TNC states that a more restrictive “blanket rule” such as the proposed condition may require the use of a bank in a situation where use of the Fund is ecologically preferable. TNC states, “*In circumstances where the Fund can demonstrate that no net loss is being achieved or where a net gain of acres or function may be achieved, we would like DEQ to maintain the flexibility granted in the current regulation to make decisions on a case-by-case basis. We believe that the appropriateness of the compensatory mitigation should be the determining factor rather than the mechanism that provides it.*” TNC suggests the following modification to the proposed condition::

*The Fund **should** not be used as a compensatory mitigation option in geographic areas having approved mitigation banks with appropriate credits available for purchase **unless mitigation provided by the Fund would be preferable in terms of replacement of wetland or stream acreage and function.*** (emphasis added by TNC)

4. VIMS: VIMS recommends that, “*Monies accumulated in the Fund should be spent in a timely manner and should be targeted by a spatially explicit plan tied to preservation and enhancement of ecosystem services in each hydrologic unit.*”
5. ESS: ESS states that “*based on DEQ state law and regulations and guidance pertaining to banking, Trust Fund allocations and mitigation projects should take place in the same watershed where the associated impacts occurred.*”
6. DCR-DNH: DCR recommends DEQ maintain the ability to make mitigation decisions on a project-by-project basis in regards to the most environmentally appropriate compensation for stream and wetland impacts and not automatically require the use of a wetland mitigation bank.”

7. FWS: FWS states, *“funds contributed from a particular HUC should only be utilized within that HUC where the impacts have occurred and must be proportional to those impacts.”*
8. CBF: CBF is concerned that the Fund has not achieved no-net-loss; particularly non-tidal mitigation in the Lower and Mid James and Rappahannock Basins and stream mitigation in the Potomac Basin, and that Fund project implementation is not proceeding at a pace to meet the no-net-loss goal. However, CBF believes that, *“such a condition would in effect shut down use of the Fund in the Chesapeake Bay Watershed, where numerous approved mitigation banks are currently operating in priority basins where significant impacts to state waters continue to take place. The proposed condition presumes, without documented evidence, that mitigation banks provide superior compensation to Fund projects.”* CBF’s final comment on this proposed condition is, *“with the exception of the river basins mentioned previously, eliminate the proposed condition that the Fund cannot be used as compensatory mitigation in geographic areas having approved mitigation banks with appropriate credits available for purchase.”*

**DEQ Response:** It appears that there is no opposition to the intent of the proposed condition. However, the wording of the proposed condition may lead to interpretations, unintended by DEQ, that DEQ prefers a particular type of entity rather than a type of compensation. The proposed condition has been reworded to incorporate suggestions from the Corps and TNC.

**Monitoring reports on wetland and stream restoration sites are completed and available for review:**

1. USACE: USACE states, *“The monitoring for Fund mitigation sites will continue to be available to DEQ and the Norfolk District intends to provide copies to DEQ when we receive them.”*
2. TNC: TNC states, *“The Corps prepares and submits an annual report detailing the Fund activities for the previous year to address the reporting requirements in the regulations. During a recent meeting, DEQ outlined specific information and requested that it be included in all future reports. The Conservancy will assist the Corps in providing the information necessary to meet DEQ and Corps reporting requirements.”* (emphasis added by TNC). TNC’s comments also reflect the opinion that their current level of mitigation site monitoring reporting is adequate, though they *“welcome input and guidance from the agencies regarding appropriate monitoring efforts for its projects.”*
3. VIMS: VIMS does not directly address this proposed condition; however, they state, *“protocols for assessing ecosystem functions of both the impacted system and compensating project should be used to track the Fund’s performance,”* and, *“...the Commonwealth should be in a much better position to evaluate the accomplishments of the Fund than current reliance on the annual report allows.”*
4. ESS: ESS states, *“...the Trust Fund projects should have the same success criteria, monitoring & reporting requirements, financial assurances and review and authorization*

*process as commercial banks do.” ESS generally states that the reporting requirements for commercial banks are far more stringent than those required of the Fund and gives the Fund an unfair advantage in the marketplace.*

5. FWS: FWS states, *“Trust Fund projects should be held to the same standards as mitigation banks in terms of success criteria, monitoring requirements, and long term protection.”*

**DEQ Response:** It appears that public sentiment shares DEQ’s interest that there should be similar monitoring requirements and success criteria for all compensatory mitigation. Different monitoring and success standards make it difficult to compare mitigation success across type and whether the no net loss policy is being achieved. A rulemaking is being undertaken by the Corps at its headquarter level to address these and other discrepancies between mitigation type in the Section 404 program. We believe that, at a minimum, all compensatory mitigation for impacts to the Commonwealth’s wetland resources should follow the *Norfolk District Corps and Virginia Department of Environmental Quality Recommendations for Wetland Compensatory Mitigation: Including Site Design, Permit Conditions, Performance Criteria, and Monitoring Criteria* and the Corps’ Regulatory Guidance Letter (RGL) 02-02. It appears that public sentiment shares DEQ’s interest in monitoring and reporting of Fund project successes.

**DEQ has input on the development of criteria to establish fee amounts for stream restoration:**

1. USACE: USACE states, *“DEQ will continue to have input. The Norfolk District has existing criteria for stream mitigation fee amounts and is currently in the process of modifying the fee schedule. We encourage you to send comments and input to us as soon as possible so they can be considered in the current revisions. Also, under its independent permitting authority, DEQ has the option of requiring fee amounts in its permits that differ from those set by the Norfolk District. As with all required mitigation, permittees would be required to satisfy the higher mitigation requirement. Accordingly, this condition may be unnecessary.”*
2. TNC: TNC states, *“to date the Corps’ fee amounts for wetland impacts have been sufficient to support wetland mitigation projects that address no-net-loss on a programmatic basis, and in most river basins, demonstrating that an adequate mechanism to establish fee amounts is in place for this resource.”* (emphasis added by TNC)
3. VIMS: VIMS does not directly address this proposed condition; however, they state, *“All permits utilizing the Fund as compensatory mitigation should be handled through DEQ headquarters to help insure a centralized and coordinated tracking of wetland and/or stream functional replacement.”* VIMS also suggest detailed financial accounting of any Fund interest accrued that is not specifically applied to an “on the ground” project.
4. FWS: FWS states, *“The amount of money collected for stream impacts appears to be to low based on information provided by consultants doing stream restoration work. We believe this issue must be addressed. We recommend that the methodology to determine the amount*

*of money required for aquatic resource impacts should receive public comment prior to finalization.”*

5. CBF: CBF generally wishes to, “*Affirm DEQ’s role in implementation of the Fund.*” and states, “*Further, DEQ’s role in the operation of the Fund should be formalized to ensure compliance with the VWPP is achieved.*” CBF also recommends that in 2006 a comprehensive study of the effectiveness of the approved mitigation banks and the Fund be conducted. The results of this in-depth study should be presented at a meeting of stakeholders and used to provide concrete recommendations for the Board’s consideration.
6. SELC: SELC states that there is uncertainty about how the Fund calculates the appropriate fee to be paid on any given project and also about how the Fund determines and validates the totals claimed for stream mitigation credits. SELC states, “*...we think it is important...for DEQ and the Corps to better explain the stream impacts and mitigation policy that the Fund will pursue...*”
7. ESS: Generally ESS is concerned that details explaining how Fund allocations are converted to credits, where the credits are assigned, and how the Fund deals with problem sites are not available, making it unclear if the Fund is meeting goals.

**DEQ Response:** It appears that public sentiment shares DEQ’s interest in establishing and using a fee mechanism which ensures that each contribution to the Fund is adequate to compensate for the wetland or stream acreage and function lost in the impacted watershed.

Respondents to this Public Notice included many comments identifying issues about the Fund and its implementation that were beyond the scope of the proposed conditions. The additional comments expressed some recurring issues. These recurring issues are summarized below and include concurring and dissenting opinions of the various respondents as appropriate. Remaining isolated concerns or issues are addressed under the Miscellaneous heading below.

#### **Does the Fund achieve the goal of no-net-loss of wetland and stream acreage and function?**

1. USACE: USACE states that requiring use of a bank when available instead of the Fund would result in violating the no-net-loss goal, thus implying that the Fund is currently achieving that goal.
2. TNC: TNC states that, “*the Fund has demonstrated a no net loss policy for wetland impacts on a programmatic basis and has made notable progress toward meeting that goal on a watershed basis.*”
3. SELC: SELC states, “*...it is unclear how the Fund will pursue this ‘no-net-loss’ goal with respect to stream impacts...*” SELC cites the disparity between projects utilizing the Fund expenditures for 50,000 linear feet of stream restoration versus those projects using expenditures for less than 4000 linear feet of stream restoration. SELC notes that the Fund claims 58,000 linear feet of stream restoration based on preservation and other techniques,

but it is unclear how these other types of mitigation factor into the no-net-loss policy with regard to streams.

4. ESS: ESS states concern that the Fund's use of a variety of mitigation techniques, including over 50% of purchased acreage going to preservation, is not insuring achievement of the no-net-loss goal. Related topics from ESS include concerns that the Fund's expenditures are not occurring in a timely manner that is geographically proximate to the impacts taken, thus implying a violation of the no-net-loss goal.
5. CBF: CBF states that they are concerned that the Fund has not achieved no-net-loss, particularly non-tidal mitigation in the Lower and Mid James and Rappahannock Basins and stream mitigation in the Potomac Basin, and are not proceeding at a pace to meet the no-net-loss goal.

**DEQ Response:** It appears that public sentiment shares DEQ's concerns and interest in achieving the no net loss policy. DEQ has a statutory obligation to ensure that the Virginia Water Protection Permit program achieves no-net-loss of wetland and stream acreage and function.

**The Fund's internal processes including accurate accounting of temporal and spatial allocation of funds versus impacts, calculation of fee rates and financial accounting need to be transparent.**

1. SELC: SELC states that there is uncertainty about how the Fund calculates the appropriate fee to be paid on any given project and also about how the Fund determines and validates the totals claimed for stream mitigation credits. SELC states, "...we think it is important...for DEQ and the Corps to better explain the stream impacts and mitigation policy that the Fund will pursue..."
2. VIMS: VIMS states that protocols should be implemented that assess the ecological functions of both the impacted system and the compensation project to track the Fund's performance. VIMS also suggests detailed financial accounting of any Fund interest accrued that is not specifically applied to an "on the ground" project.
3. ESS: Generally ESS is concerned that details explaining how Fund allocations are converted to credits, where the credits are assigned, and how the Fund deals with problem sites are not available, making it unclear if the Fund is meeting goals.
4. FWS: FWS recommends that the Fund provide a more detailed annual report with specific information regarding work accomplished, including maps, plans and other details. Recommends that watersheds not meeting goals of the Fund be clearly identified in the annual report.
5. CBF: CBF recommends that in 2006 a comprehensive study of the effectiveness of the approved mitigation banks and the Fund be conducted. The results of this in-depth study

should be presented at a meeting of stakeholders and used to provide concrete recommendations for the Board's consideration.

**DEQ Response:** It appears that public sentiment shares DEQ's interest in ensuring that there is an accurate accounting of the Fund, and that contributed monies are being used directly to support the no-net-loss policy.

### **Miscellaneous Comments**

1. The Fund provides nonprofit land conserving agencies the means to act quickly to protect, enhance and restore significant wetland and stream resources that might otherwise be vulnerable to permanent impairment. (NPS-BRP comment)

**DEQ Response:** We agree that the Fund is a viable compensatory mitigation option for small impacts, where no approved mitigation banks exist, or where the Fund's projects provide compensation that is ecologically preferable to other compensation options.

2. The Fund should help (provide money) with stream bank restoration on farming properties, similar to federal and state programs providing financial assistance for cattle exclusion, buffering, etc. (WVLT comment)

**DEQ Response:** We strongly support this suggestion, provided that compensation standards and existing statutes and regulations are upheld.

3. Permits utilizing the Fund should be exclusively handled through DEQ's Central Office to coordinate tracking of wetland and stream functional replacement. (VIMS comment)

**DEQ Response:** While we appreciate the comment's inference that centralized permitting of projects using the Fund would lead to better tracking for the no-net-loss goal, it is not practical to centralize such permitting based on staff resources and DEQ's established permitting structure.

4. Fund contributions not used by a certain time should be used to purchase commercial bank credits within the same geographic area as the impacts. (ESS comment)

**DEQ Response:** We believe that this is a good suggestion, particularly in watersheds with available mitigation bank credits and no or little expenditures from the Fund.

5. The Board should change the easement requirement from perpetual to 50-100 years to tap into a large pool of available restoration sites whose owners are not willing to permanently deed land. (CVI comment)

**DEQ Response:** The Board cannot change the perpetual easement requirement, as it is required by statute. Perpetual easements are important as it is impossible to predict future development pressures.



6. The Board should designate a lead agency to monitor and enforce easements maintained through the Fund. (CVI comment)

**DEQ Response:** We agree that long-term stewardship of Fund project sites is an unresolved issue. If Fund projects were reviewed by an interagency team, similar to Mitigation Bank Review Teams and as outlined in *Federal Guidance on the Use of In-Lieu-Fee Arrangements of Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act* (dated October 2000), this issue may be resolved by the oversight of the review team.

7. Maintain preservation as a viable compensatory mitigation option. (DCR-DNH comment)

**DEQ Response:** Various studies (VIMS, USFWS, and others) have thoroughly documented that the Commonwealth has lost over 40% of its wetland resources since Colonial times. To provide an accurate picture of no-net-loss/net gains as required by DEQ's strategic plan, our commitments made in the Chesapeake Bay 2000 agreement, and our statutory requirements, we must ensure that all compensatory mitigation options are meeting the no-net-loss policy. We agree that preservation should remain a component of any compensatory mitigation package. However, emphasis must be placed on restoring or creating wetlands and restoring streams not only to achieve the no-net-loss policy but to realize a net gain in wetland resources to reverse these historic losses.